UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., AND
BANK OF AMERICA CORPORATION

and Case 31-CA-072916

JOSHUA D. BUCK and MARK THIERMAN,
THIERMAN LAW FIRM

and Case 31-CA-072918

PAUL CULLEN, THE CULLEN LAW FIRM

*Katherine Mankin, Esq.,* for the General Counsel.
*Paul Berkowitz, Gregg A. Fisch* and
*Richard W. Kopenhefer, Esqs.*
*(Sheppard Mullin Richter & Hampton LLP),*
of Los Angeles, California, for the Respondent.
*Joshua D. Buck, Esq. (Thierman Law Firm P.C.),*
of Reno, Nevada, for Charging Party Theirman.
*Paul T. Cullen, Esq. (The Cullen Law Firm),*
of Agoura Hills, California, for John White.
*Shaun Setareh, Esq. (The Law Offices of Shaun Setareh,)*
of Los Angeles, California, for Dominique Whitaker.

# DECISION

## STATEMENT OF THE CASE

**WILLIAM G. KOCOL,** Administrative Law Judge. This trial in this case opened in Los Angeles, California, on December 10, 2012. At that time I postponed the case indefinitely to allow the parties time to complete a stipulated record. On December 18, 2012, all parties filed a joint motion to accept parties' joint stipulation of facts and to close the record. Upon consideration, that motion is granted, Joint Exhibits 1-20 are received into evidence, and the record is closed.

Joshua D. Buck and Mark Thierman, Thierman Law Firm filed the charge in Case 31-CA-072918 on January 19, 2012 and Paul Cullen, The Cullen Law Firm filed the charge in Case

31-CA-072918 against Countrywide Financial Corporation (CFC), Countrywide Home Loans, Inc. (CHL) and Bank of America Corporation (BAC), collectively called Respondents and the General Counsel issued the order consolidating cases, consolidated complaint, and notice of hearing on October 23, 2012. The complaint as amended at trial, alleges that Respondents violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that requires employees to arbitrate all employment-related claims, including any claims arising under a Federal statute or regulation, and by asserting it against employees Dominique Whitaker (Whitaker) and John White (White) in a lawsuit brought by those employees against the Respondent.

Respondents filed a timely answer that denied "each and every" allegation in the complaint except that it admitted the Board's jurisdiction over BAC and that "on or about September 19, 2011, the United States District Court for the Central District of California, Honorable Christine A. Snyder presiding, in *Whitaker, et al, v. Countrywide Financial Corporation, et al,* Case No. VC 09-5898 (PJWx), granted, in part, Respondents' motion to compel arbitration and also stayed litigation. Respondents further admit that, in the Order, the District Court specifically found that the 'question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide.'" Respondent asserted a number of affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Parties, and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Effective July 1, 2008, through a complex and involved transaction, BAC became the ultimate parent company of the entity that was previously named "Countrywide Financial Corporation" but has since merged out of existence (the Merged CFC) and its subsidiaries (the Merged CFC's Subsidiaries), including CHL. Prior to the July 1, 2008 transaction, the Merged CFC was a holding company, incorporated under the laws of the State of Delaware, with its corporate headquarters in Calabasas, California. At that same time, CHL was a separate company and a wholly-owned subsidiary of the Merged CFC. CHL was, and continues to be, incorporated in New York, with its corporate headquarters in Calabasas, California.

At all material times, BAC has been a separate company from CFC (and the Merged CFC as well) and CHL, and is incorporated under the laws of the State of Delaware, and its corporate headquarters are in Charlotte, North Carolina, with an office and place of business in Lancaster, California, and has been engaged in the operation of a financial institution providing financial services. In conducting its operations during the 12-month period ending March 23, 2012, BAC, on its own or through its subsidiaries, in the course and conduct of its business operations described above had gross revenue valued at in excess of $500,000. During the same 12-month period, BAC, on its own or through its subsidiaries, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the

State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the state.

At all material times through at least March 31, 2009, CFC was a corporation with an office and place of business in Calabasas, California, and a holding company which, through its subsidiaries, engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting. In conducting its operations during the 12-month period ending March 31, 2009, CFC, on its own or through its subsidiaries, in the course and conduct of its business operations described above, had gross revenue valued at in excess of $500,000. During the same 12-month period, CFC, on its own or through its subsidiaries, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the state.

At all material times through at least March 31, 2009, CHL was a corporation with an office and place of business in Calabasas, California, and engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting. In conducting its operations during the 12-month period ending March 31, 2009, CHL, in the course and conduct of its business operations described above had gross revenue from its operations valued at in excess of $500,000. During the same 12-month period, CHL, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the State of California. At all material times, CHL, BAC, and CFC, each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The foregoing facts are taken from the parties' joint stipulation.

However, Respondents do not admit or stipulate that either BAC or CFC was an employer of Whitaker or White. And it is important to note that the complaint does not allege any relationship between the Respondents such as a single- integrated enterprise, joint employer, successorship, or agency.

## II. Alleged Unfair Labor Practices

### *A. Arbitration Agreement*

On or about August 30, 2007, Whitaker applied for employment at CHL. On or about August 30, 2007, as part of the application process, CHL presented Whitaker with a mutual agreement to arbitrate claims (the arbitration agreement) and Whitaker electronically checked "I agree." Whitaker began working for CHL on or about November 19, 2007, as a customer service telephone representative. She went out on a leave of absence on or about May 5, 2008,

and did not return to work at CHL after that date. Her last day of employment at CHL was on or about August 20, 2008. On or about September 26, 2008, White applied for employment at CHL. On or about September 26, 2008, CHL, as part of the application process, presented White with the arbitration agreement, and White electronically checked "I Agree." White worked for CHL as an account manager from in or about November 2008 until approximately November 2009. Neither Whitaker nor White is still employed by CHL and neither ever worked for BAC or CFC.

The arbitration agreement bears the heading "Countrywide Financial" and explains that reference in that agreement to the "Company" means "Countrywide Financial Corporation and all of its subsidiary and affiliated entities, . . . and all successors and assigns from any of them." The arbitration agreement contains the following provision:

> Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation due . . . and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims. The parties' responsibilities and legal remedies available under any substantive law applicable to a Covered Claim shall be enforced in any arbitration conducted pursuant to this agreement.

The arbitration agreement also provides that "Nothing in this Agreement shall be construed to require any claim if an agreement to arbitrate such a claim is prohibited by law." The arbitration agreement indicates that each party entered the agreement "voluntarily"; however, if the employee did not agree to the arbitration agreement, then the employee "will not be able to move forward in the application process at this time." The arbitration agreement is silent concerning whether arbitration may be compelled on an individual or collective basis.

During the period of in or about 2007 through approximately March 31, 2009, applicants for employment at CHL typically were presented with an arbitration agreement, similar to those described above, or with language substantially similar to the arbitration agreement.

*B. Lawsuit*

On or about June 16, 2009, Whitaker filed lawsuit against CFC and BAC in Ventura County Superior Court. On or about August 12, 2009, the case was removed to the United States District Court for the Central District of California. As amended, the lawsuit, a putative class action, alleges seven claims of failure to pay overtime and other wages in violation of California and Federal law. The putative class of employees includes employees of "Countrywide" and *not* any employees of BAC. Rather, the claims against BAC were brought as a "successor in liability." On June 27, 2011, White was added to the lawsuit. On or about August 22, 2011,

CFC, BAC, and CHL filed motions to compel individual arbitration for Whitaker's and White's claims.

Whitaker and White filed an opposition to the motions to compel, and CFC, BAC, and CHL then filed a reply. In both the motion to compel and the reply, Respondents unequivocally expressed its intent to compel individual, and not class, arbitration. Respondents' arguments, however, were not based on any purported waiver of class-based arbitration contained within the arbitration agreement. Rather, Respondents argued that case law, as described below, compelled individual arbitration. On September 19, 2011, United States District Court Judge Christine A. Snyder granted, in part, the motions to compel, and also stayed the litigation of the lawsuit. In doing so Judge Snyder rejected the assertion that Section 7 rendered the arbitration agreement unenforceable; the court pointed to case authority that described that argument as "nonsensical." Judge Snyder held that "the question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide."

On or about June 11, 2012, CFC, BAC, and CHL filed a motion for partial reconsideration of Judge Snyder's order. On or about June 25, 2011, Whitaker and White filed an opposition to the motion for partial reconsideration and on or about July 16, 2012, CFC, BAC, and CHL filed a reply. On or about August 20, 2012, Judge Snyder denied the motion for partial reconsideration. To date, the parties have not selected an arbitrator. There has been no determination by an arbitrator (or any other authority) as to whether Whitaker and White can assert their employment-related claims on a class-wide or collective basis in arbitration. On or about October 19, 2011, Whitaker and White filed with the Ninth Circuit a petition for writ of mandamus; on or about October 30, 2012, CFC, BAC, and CHL also filed a petition for writ of mandamus with the Ninth Circuit.

To summarize, Respondents have sought to compel litigation of Whitaker's and White's claims made in the lawsuit on an individual basis before an arbitrator and White and Whitaker have collectively resisted Respondents' efforts. Importantly, Respondents' have *not* contended that White and Whitaker have waived their right under the arbitration agreement to act collectively in seeking class-wide arbitration; rather, Respondents' have only argued that case law favors their position and they did not otherwise agree to class-wide arbitration.

## III. ANALYSIS

### *A. Arbitration Agreement*

The complaint alleges that Respondents have maintained and enforced the arbitration agreement that includes provisions that require employees to arbitrate all employment-related claims, including any claims arising under Federal statute or regulation. I have described above how that arbitration agreement does so. Respondents argue that BAC and CFC should be dismissed as parties in the complaint. I have noted above that Whitaker and White were employed by CHL and not BAC or CFC. I have also described how CHL but not BAC or CFC required employees to sign the arbitration agreement. In his brief the General Counsel correctly points White and Whitaker are statutory employees in a general sense and the facts show that BAC and CFC are employers engaged in commerce. But so is General Motors. Importantly, the

General Counsel has not pled in complaint or even explained at the hearing any legal theory under which BAC and CFC should be held liable for the conduct of CHL. This lack of due process has caused Respondents to guess that the General Counsel is proceeding under a "successorship" theory, given that this was the theory used by the charging parties to join BAC in the lawsuit at issue in this case. But the facts do not support such a theory. Under these circumstances I conclude that relationship of BAC and CFC to this allegation of the complaint is too attenuated to hold them liable. I dismiss BAC and CFC from this allegation.

Although the arbitration agreement was signed well outside the 10(b) period, CHL sought to maintain it within that period. The arbitration agreement, as reasonably read by employees, prohibits employees from filing charges with the Board, an activity protected by Section 7 and Section 8(a)(4). An employer cannot condition employment on a waiver of employees' right to file charges with the Board and thereby lose the advantages provided to them by the Act. *Supply Technologies, LLC,* 359 NLRB No. 38 (2013); *D. R. Horton,* 357 NLRB No. 184, slip op. at 2 (2012; *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). For example, by compelling arbitration as a substitute for Board proceedings, the employee must forego having a Board agent conduct an investigation of the charge, thereby acquiring evidence and then making a legal analysis of that evidence. The employee gives up the benefit of an NLRB- prepared complaint as well as having an NLRB attorney prosecute the complaint. Nor will the employee have the resources of the General Counsel to prepare any meritorious case against the Respondents. Indeed, the Supreme Court has indicated that Congress intended to ensure that employees be "completely free from coercion" with respect to access to the Board. *NLRB v. Scrivener,* 405 U.S. 117, 123 (1972). In its brief Respondents do not address the merits of this allegation of the complaint. I conclude that by maintaining an arbitration agreement that interferes with employees' right to file charges with the Board, CHL violated Section 8(a)(1). Nothing in this conclusion should properly be understood to touch upon Respondents' First Amendment right to petition the Government for a redress of grievances, described more fully in the following section of this decision. Respondents' remain free to assert their claims concerning the meaning of the arbitration agreement in the lawsuit. Rather, it is only the maintenance of an unlawfully broad policy that I find unlawful; this finding does not require Respondents to alter their litigation position.

### *B. Lawsuit*

The complaint alleges that Respondents violated Section 8(a)(1) "by moving the district court to compel plaintiffs Whitaker and White to individually arbitrate their class-wide wage and hour claims against Respondent." I have described above how, in its motion to compel, Respondents unequivocally expressed its intent to compel individual, and not class, arbitration. I have also described above how the arbitration agreement is silent concerning this matter and at no time have Respondents argued that the arbitration agreement, by its terms, compelled only individual arbitrations. I have also described above how Whitaker and White have continued to maintain that their claims should be heard collectively and there is no evidence that Respondents have sought to interfere with, as opposed to disagree with, that contention. The General Counsel argues that *D. R. Horton,* supra, requires the conclusion that Respondents here violated the Act. I disagree. First, I identify the Section 7 rights implicated in *D. R. Horton.* In that case the employer required, as a condition of employment, that employees sign an agreement that precluded them *filing* joint collective, or class action claims concerning their working conditions.

The Board held that "Collective *pursuit* of a workplace grievance in arbitration is . . . protected by the NLRA." Id., slip op. at 2 (emphasis added). The Board concluded:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to *waive* their NLRA right to collectively *pursue* litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' rights are preserved without requiring the availability of classwide arbitration. Employers remain free to *insist* that arbitral proceedings be conducted on an individual basis.

Id., slip op. at 12 (emphasis added). The Board gave, as an example, Rule 23 of the Federal Rules of Civil Procedure. The Board stated that there is no Section 7 right to class certification. It continued:

> Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature *as may be available to them under Federal, State or local law. … [T]heir employer remains free to assert any and all arguments against certification (other than the MAA).*

Id., slip op. 10 fn. 24 (emphasis added). So the Section 7 that could not be waived in *D. R. Horton* was the right of employees to collectively pursue class or collective work-related complaints against their employer. This is different from any right that the claims be heard and decided on a class- wide basis; that issue is for the appropriate forum, and not the Board, to decide. Here, Respondent did nothing more than argue before the appropriate forum that the claims be heard on an individual basis, and it did so not on the basis that the employees had waived their right to pursue class- wide claims. Rather, it relied solely on case law that it felt support that position.

The General Counsel argues:

> This is a hollow sanctuary. While employees may be able to argue to an arbitrator that they are entitled to bring their claims as a class, *Stolt-Nielsen*[1] and *AT&T Mobility v. Concepcion*[2] make clear that the arbitrator has no authority to grant such status in the absence of some authorization for class arbitration in the arbitration agreements themselves or where, as here, the agreements are silent as to whether the mandatory arbitration may be heard on a collective or class basis. See *Stolt-Nielsen,* 130 S. Ct. at 1775("a party may not be compelled under the FAA to submit to class arbitration unless there is a basis for concluding that the party *agreed* to do so") (emphasis in original); *AT&T Mobility v. Concepcion,* 131 S. Ct. at 1750 ("the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them").

[1] *Stolt-Nielsen SA v. Animal Feeds Int'l Corp*., 130 S. Ct. 1758 (2010).
[2] 131 S. Ct. 1740 (2011).

But by making this argument the General Counsel conflates the Section 7 right to collectively seek class wise arbitration with the non Section 7 right to actually have their claims addressed in a class wide fashion; as described above this was something the Board was careful to differentiate in *D. R. Horton.*

What the General Counsel is seeking in this case is to have the Respondents stop presenting their legal arguments to the court concerning why class-wide arbitration is not appropriate. If the Board were to do so, it would likely trench upon Respondents' rights under the First Amendment "to petition the Government for a redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983)[3]; *BE & K Construction v. NLRB*, 536 U.S. 516 (2002). The General Counsel cites *Elevator Constructors (Long Elevator),* 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). In that case the Board concluded that a grievance filed by a union concerning the meaning of a contract clause, if successful, would result in the clause being read in a manner that violated Section 8(e); the grievance thereby violated Section 8(b)(4)(ii)(A). The Board concluded that *Bill Johnson's* did not preclude it from reaching that result. But that case is clearly inapposite here. Respondents have not sought to have the court interpret the arbitration agreement in a manner that would violate the Act. And while, as the Charging Parties point out in their brief, Respondents have argued that the arbitration agreement does not provide for class-wide arbitration but only individual arbitration, these assertions must be seen in context. That context shows that Respondents are arguing that under existing law, class-wide arbitrations can arise only by agreement of the parties and the arbitration agreement does not so provide. In other words, Respondents are *not* arguing that under the terms of the arbitration Agreement the employees waived whatever right they may have to make class wide claims. I dismiss this allegation of the complaint.[4]

## CONCLUSION OF LAW

By maintaining an arbitration agreement that interferes with employees' right to file charges with the Board, CHL has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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[3] Fn. 5 of that decision offers no way out for the General Counsel because the motions to compel individual arbitration at issue in this case do not have an objective that is illegal under Federal law. To the contrary, those motions simply assert existing Federal case law as viewed by Respondents.

[4] The complaint also alleges that Respondent independently violated Sec. 8(a)(1) by "About August 30, 2007, Respondent required employee Dominique Whitaker to agree to the arbitration agreement" and "About September 26, 2008, Respondent required employee John White to agree to the arbitration agreement." Of course, those allegations are facially invalid under Sec. 10(b) and I dismiss them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Countrywide Home Loans, Calabasas, California, its officers, agents, successors, and assigns, shall

1. (a) Cease and desist from maintaining an arbitration agreement that interferes with employees' right to file charges with the Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Calabasas, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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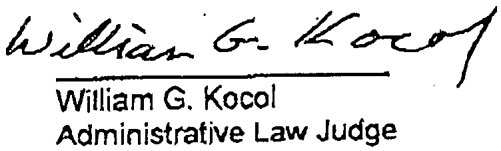
[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. February 13, 2013



William G. Kocol
Administrative Law Judge

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**APPENDIX**

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain an arbitration agreement that interferes with employees' right to file charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Countrywide Home Loans
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.